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FEDERAL ELECTION COMMISSION

999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR 5996

DATE COMPLAINT FILED: 04/15/08

LAST RESPONSE RECEIVED: 06/09/08

DATE OF NOTIFICATION: 05/01/08

DATE ACTIVATED: 06/30/08

EXPIRATION OF SOL: 3/28/2013

COMPLAINANT:

Democratic Congressional Campaign Committee

RESPONDENTS:

Education Finance Reform Group
Tim Bee for Congress and David Katsel, in his
official capacity as treasurer

RELEVANT STATUTES:

2 U.S.C. § 441a(a)(7)(B)
2 U.S.C. § 441a(a)(1)(A)
2 U.S.C. § 441a(f)
2 U.S.C. § 441d(a)
2 U.S.C. § 433
2 U.S.C. § 434(b)
11 C.F.R. §§ 109.21(b), (c) and (d)
11 C.F.R. § 109.23

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The complaint alleges that a 2008 television advertisement financed by Education Finance Reform Group ("EFRG"), a group formed by local Arizona school districts to lobby on state education issues, expressly advocated the election of Tim Bee, a candidate for the House in Arizona's 8th Congressional District. Complainant maintains that the advertisement constituted an excessive and prohibited in-kind contribution to Bee's principal campaign committee, Tim Bee for Congress ("the Committee"), based on its belief that EFRG was a corporation and that

1 the ad was coordinated between EFRG and Bee.¹ The complaint further alleges that EFRG
2 failed to register and report as a political committee despite spending more than \$16,000 to
3 finance the ad, and that it failed to include the requisite disclaimer on the ad.

4 As discussed below, we conclude that EFRG's advertisement satisfies the payment and
5 content prongs of the coordinated communications regulations. Although the ad does not satisfy
6 the express advocacy content standard, it satisfies the republication content standard because
7 EFRG republished a campaign photo of Bee in the ad. The available information is not
8 sufficient to determine whether or not the conduct prong was satisfied through Bee's appearance
9 in the ad. We believe, however, that an investigation aimed at making that determination does
10 not warrant the commitment of further Commission resources because the content prong is
11 satisfied only by a republished photo that was incidental to the advertisement and that we
12 conclude had *de minimis* value. Therefore, we recommend that the Commission exercise its
13 prosecutorial discretion and dismiss the coordinated communication allegations as to EFRG, Tim
14 Bee and the Committee.

15 In light of the *de minimis* value of EFRG's republication, we also recommend that the
16 Commission find no reason to believe that EFRG violated 2 U.S.C. § 441(a)(1)(A) by making an
17 excessive in-kind contribution to the Committee in the form of a republished photo. We also
18 recommend that the Commission find no reason to believe that EFRG violated
19 2 U.S.C. § 441b(a) by making a prohibited in-kind corporate contribution as a result of its
20 republication because Arizona state corporate records confirm that EFRG is not a corporation.

¹ The complaint makes its allegations against "an unnamed organization" but cites to a newspaper article in a footnote that identified the organization as EFRG. EFRG confirms it financed the ad. EFRG Response at 1.

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1 With respect to the allegations that EFRG was a political committee, we recommend that
2 the Commission find no reason to believe that EFRG violated 2 U.S.C. §§ 433 and 434 by failing
3 to register or report as a political committee because there is no information other than the *de*
4 *minimis* republication of campaign material that potentially would count towards the \$1,000
5 statutory threshold and the available information is not sufficient to suggest that EFRG's major
6 purpose was federal campaign activity.

7 Finally, we recommend that the Commission find no reason to believe that EFRG
8 violated 2 U.S.C. § 441d(a) by failing to include a disclaimer on its advertisement because EFRG
9 does not appear to be a political committee and the ad does not expressly advocate Tim Bee's
10 election.

11 II. FACTUAL AND LEGAL ANALYSIS

12 A. Factual Summary

13 EFRG is an unincorporated group of 16 local school districts formed through an
14 inter-governmental agreement to lobby the Arizona legislature for changes in teacher
15 performance pay. EFRG Response at 2; Daniel Scarpinato, *Tax Dollars Fund 30-Second TV*
16 *Spot Lauding Bee*, Arizona Daily Star (April 8, 2008), available at 2008 WLNR 7328636
17 ("Scarpinato, *Tax Dollars*"). A primary outcome of the two-year old group's efforts was to help
18 pass Senate Bill 1488, legislation sponsored by Tim Bee, who was a sitting state senator when he
19 became a candidate in the primary election for the U.S. House of Representatives. Senate Bill
20 1488 concerned a Teacher Performance Pay Program. *Id.* Following passage of the legislation
21 in the state senate on March 20, 2008, EFRG began airing an ad on or around March 28, 2008 on

selected cable television stations in the 8th Congressional District.² Scarpinato, *Tax Dollars*:
Complaint at 2. According to the Arizona State Legislature website, at the time the ad aired,
Senate Bill 1488 was pending in two state house committees.

A transcript of the ad (hereinafter "the ad" or *Thank You*), including a description
of the video, is as follows:

<u>Audio</u>	<u>Visual</u>
Thank you, Senator Bee	Film footage of Tom Murphy, board member, Sahuarita School District
Senator Bee, I would like to thank you as a parent for your continued support of education.	Film footage of Kris Ham, parent, Sahuarita School District
Thank you, Senator Bee, for supporting students in southern Arizona.	Film footage of Richard Connet, President, Vail Education Association
Narrator: Senate Bill 1488 sponsored by Senate President Tim Bee . . .	Footage of Bee apparently taped from television with 3/4/08 date in corner of frame and chyron reading: "SB 1488 schools; teacher performance pay programs," "Senate appropriations"
. . . will level the playing field so that all teachers in southern Arizona will receive greater pay for performance.	Footage of Bee outdoors in a discussion with several people, including individuals featured in the ad
Narrator: The Tucson Citizen stated "Bee's bill, supported by school districts, parents, teachers, and advocates of education would allow all districts to participate."	Excerpts quoting from two newspaper articles published in "The Tucson Citizen"
Narrator: Tim Bee: Fighting for fairness for southern Arizona.	Picture of Tim Bee next to text: "Tim Bee" "Senate Bill 1488" "Fighting for Fairness for Southern Arizona"
Thank you, Senator Bee.	Film footage of two female elementary-school aged children

² The Arizona primary was held on September 2, 2008. After notifying the Commission in September 2007 that he was exploring a run for the House and designating an exploratory committee, Bee filed a Statement of Candidacy and a Statement of Organization on January 25, 2008. News articles appearing at the time the ad began airing presumed, correctly, that Bee would face the incumbent Democrat, Gabrielle Giffords, in the general election.

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1 Following public attention about the financing of what appeared to be a political ad with
2 taxpayer dollars, the cable company reportedly pulled the ad on or about April 8, in part so that
3 the ad sponsor could be identified. Scarpinato, *Tax Dollars, supra*. The following day, EFRG
4 announced that it had cancelled the ad because a state house committee had approved the bill and
5 because the ad was being perceived as a move against the Democratic incumbent in the 8th
6 Congressional District. Scarpinato, *Schools Group Pulls Ad That Supports Bee*, Arizona Daily
7 Star (April 10, 2008), available at <http://www.azstarnet.com/sn/printDS/233730> ("Scarpinato,
8 *Schools Group*"). Hours later, Bee called for the ad to be removed in a public statement. *Id.* An
9 unspecified portion of the \$16,000 EFRG reportedly paid for the ad was expected to be refunded.
10 *Id.*

11 **B. Analysis**

12 **1. Coordination Allegations**

13
14 Under the Federal Election Campaign Act of 1971, as amended ("the Act"), an
15 expenditure made by any person "in cooperation, consultation, or concert, with, or at the request
16 or suggestion of, a candidate, his authorized political committees or their agents" constitutes an
17 in-kind contribution. 2 U.S.C. § 441a(a)(7)(B)(i). A communication is coordinated with a
18 candidate, a candidate's authorized committee, or agent of either when the communication
19 satisfies the three-pronged test set forth in 11 C.F.R. § 109.21(a): (1) the communication is paid
20 for by a person other than a candidate, the candidate, committee, or an agent of either; (2) the
21 communication satisfies at least one of the content standards set forth in 11 C.F.R. § 109.21(c);
22 and (3) the communication satisfies at least one of the conduct standards set forth in 11 C.F.R.
23 § 109.21(d).

1 The payment for a coordinated communication is an in-kind contribution to the candidate
2 or his or her authorized committee with whom it was coordinated. *See* 11 C.F.R.
3 § 109.21(b)(1). Further, the in-kind contribution will be considered received and accepted by the
4 candidate or his or her authorized committee and must be reported as an expenditure made by the
5 candidate or his or her authorized committee under certain circumstances. *See* 11 C.F.R.
6 § 109.21(b)(1) and (2).

7 a. **The Payment Prong**

8 EFRG admits that it paid for *Thank You*. EFRG Response at 1. Therefore, the payment
9 prong of 11 C.F.R. § 109.21(a)(1) is satisfied.

10 b. **The Content Prong**

11 At all times relevant to this matter, the content prong was satisfied if the communication
12 at issue met at least one of four content standards. Only two apply here: (1) a public
13 communication that republishes, disseminates, or distributes, in whole or part, a candidate's
14 campaign materials; and (2) a public communication that contains express advocacy. *See*
15 11 C.F.R. § 109.21(c)(2) and (3). Neither of the other two content standards – electioneering
16 communications and 90-day pre-election public communications – is implicated because the ad
17 aired more than five months before the September primary election, well outside the time frames
18 covered by those standards. *See* 11 C.F.R. § 109.21(c)(1) and (4).³

³ The U.S. District Court for the District of Columbia held that the Commission's revisions of the content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not enjoin the Commission from enforcing the regulations. *See Shays v. F.E.C.*, 508 F. Supp. 2d 10 (D.D.C. Sept. 12, 2007) (granting in part and denying in part the respective parties' motions for summary judgment). Recently, the D.C. Circuit affirmed the district court with respect to, *inter alia*, the current standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays v. F.E.C.*, 528 F.3d 914 (D.C. Cir. 2008).

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(i). Express Advocacy

The complaint contends that *Thank You* expressly advocated Tim Bee's election pursuant to 11 C.F.R. § 100.22(b), which if true, would satisfy the content prong of the coordinated communication rules.

Section 11 C.F.R. § 100.22(b) provides that "expressly advocating" means any communication that—

When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

- (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
- (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

The complaint relies on a number of external events to support its assertion that a reasonable person could not interpret the ad as anything other than express advocacy. It asserts that the ad aired "in the midst of a heated [congressional] campaign" in the 8th Congressional District and argues that it cannot reasonably be viewed as an effort to thank Bee for his work on SB 1488 because the bill had already passed the state senate when the ad was broadcast. Complaint at 2. It also states that an individual who appeared in the ad admitted to a reporter that "[w]e all knew it was going to be used also for his run against [the Democratic incumbent] Giffords." *Id.*, citing to Scarpinato, *Tax Dollars, supra*. The individual quoted by the reporter was a teacher in one of the school districts participating in EFRG.

In specifically addressing the ad's content, the complaint looks to the phrase "Tim Bee . . . Fighting for Fairness for Southern Arizona" and explains that it is similar to the phrase "Rick Renzi/Improving the Quality of Life in Arizona" in a direct mailing at issue in MURs

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1 5577/5620 (Nat'l Assoc. of Realtors), which the Commission found to constitute express
2 advocacy. Complaint at 2.

3 Respondents both deny that the ad expressly advocated Bee's election to Congress and
4 assert that the ad advocated an issue. EFRG Response at 1, 3-4; Committee Response at 2.
5 EFRG states that the ad was meant to advance the lobbying effort for SB 1488 which was headed
6 to the state House of Representatives, to increase public awareness and support for the bill, and
7 to thank Bee for his sponsorship of it. EFRG Response at 2. It argues that the ad does not
8 contain an "electoral portion" as referenced in Section 100.22(b) and disputes that an ad thanking
9 Bee for sponsoring a specific piece of legislation could only be interpreted as expressly
10 advocating Bee to Congress. *Id.* at 3-4. Finally, EFRG contends that the complaint improperly
11 relies on external events in its application of 11 C.F.R. § 100.22(b). Nonetheless, EFRG
12 submitted an email written by the teacher who appeared in the ad in which he asserts that he was
13 speaking for himself when he told the reporter who quoted him that he *assumed* that Bee might
14 use the ad in his campaign against his Democratic opponent. EFRG Response at 2 and Exhibit C
15 thereto.

16 We believe, on balance, that *Thank You* may be reasonably interpreted as having a
17 meaning other than expressly advocating Bee's election to federal office. On the one hand,
18 *Thank You* resembles the Renzi mailers in MURs 5577/5620 in the repetitious use of Bee's name
19 and in its use of the phrase, "Tim Bee . . . Fighting for Fairness for Southern Arizona." In
20 addition, this phrase appears below a photo of Bee that appeared on the home page of the
21 Committee's website and was available elsewhere on the site as a download (*see discussion infra*
22 at p. 9-10). On the other hand, the single legislative issue at the center of *Thank You* was
23 education, and more specifically, SB 1488, a bill that Bee had sponsored and that had an integral

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1 connection to the school districts who participated in EFRG. The ad began airing soon after the
2 successful state senate vote on the legislation and at the same time state house committees were
3 considering it, well before Arizona's September primary and the November general elections.
4 These facts distinguish *Thank You* from the Renzi mailers. The Renzi mailers did not focus on a
5 specific piece of legislation currently under consideration but centered on selected
6 accomplishments during the candidate's first term on a wide range of issues, some with no
7 obvious connection to the payer's core mission of increasing home ownership.

8 Given the legislative focus in *Thank You* and the fact that it aired coincident with the state
9 legislature's consideration of the subject legislation, we conclude that, on balance, reasonable
10 minds could differ as to whether the ad encouraged viewers to elect Bee or encouraged viewers
11 to support SB 1488 and thank Bee for his sponsorship of it. Therefore, *Thank You* does not
12 expressly advocate Tim Bee's election to Congress. See MUR 5779/5805 (City of Santa
13 Clarita)(banners thanking a U.S. Representative for a specific piece of legislation did not
14 expressly advocate his election because they could be reasonably interpreted as messages
15 advocating passage of the legislation and thanking the legislator for sponsoring it).

16 (II). Republication

17 An examination of the *Thank You* video found on the internet raises an issue as to
18 whether the ad satisfied the republication standard of the content prong in 11 C.F.R.
19 § 109.21(c)(2). A frame towards the end of the 30-second ad that appears on screen for two
20 seconds contained a photo of Bee next to text that read, "Tim Bee, Senate Bill 1488," and above
21 the "Fighting for Fairness for Southern Arizona" phrase. As noted, *supra*, the Bee photo in
22 *Thank You* is identical to a "head shot" photo of Bee that appeared on the home page of the
23 Committee's website. The photo was also available as a high resolution download in the "Media

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1 Kit" section of the site. See Attachment 1. Given the website's display of the photo and its
2 invitation to download it, it is reasonable to infer that the Bee photo used in *Thank You*
3 constituted campaign material prepared by the Committee.

4 The republication of the candidate's campaign photo meets the content standard set forth
5 in 11 C.F.R. §109.21(c)(2), which includes the republication of campaign material, in whole or
6 in part, prepared by a candidate or his authorized committee in a public communication, unless
7 excepted under 11 C.F.R. § 109.23(b). None of the exceptions in Section 109.23(b) apply here.

8 The Explanation and Justification to the Commission's post-BCRA coordinated
9 communications regulations addressed the incorporation of a candidate photograph prepared by
10 the candidate's campaign in a third party-communication. See Explanation and Justification,
11 *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 443 (Jan. 3, 2003) ("2003
12 *Coordination E&J*" or "E&J"). Specifically, in discussing a limitation to one of the exceptions
13 to Section 109.23(b) relating to campaign material incorporated into a communication that
14 advocates the defeat of the candidate that prepared the material, the Commission noted that if
15 such a communication also urged the election of the candidate's opponent and contained a
16 photograph or quote prepared by the opponent's campaign, then the result would constitute an
17 in-kind contribution to the opponent. See *id.*

18 Subsequently, the Commission considered whether the republication of campaign
19 photographs in third-party mailers constituted an in-kind contribution in MUR 5743 (Betty
20 Sutton for Congress/Emily's List). The Commission first determined that the mailers did not
21 meet the conduct prong and were therefore not coordinated within the meaning of Section
22 109.21. The Commission's finding was based primarily on affidavits that the third party financier
23 independently downloaded photos of the candidate from her Committee's website and included

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1 them in its own direct mailings without discussion with the campaign. It then considered
2 whether the republished photographs constituted excessive in-kind contributions by the third
3 party to the Committee under 11 C.F.R. § 109.23. Section 109.23 provides that the financing by
4 third parties of the republication, distribution or dissemination of candidate-prepared campaign
5 materials is an-kind contribution by the financier to the candidate, irrespective of coordination
6 with a candidate or his or her committee. The Commission concluded that the use of the
7 photographs constituted republication under Section 109.23 but decided to admonish the
8 respondent and dismiss the matter given the difficulty in determining the likely *de minimis* value
9 of the resulting in-kind contributions. See First General Counsel's Report in MUR 5743 ("MUR
10 5743 FGCR") and Certification dated December 5, 2006. Admonishment was appropriate
11 because, despite the likely *de minimis* value of the republished photos, the respondent had
12 already contributed the maximum amount permissible to the candidate's committee. See MUR
13 5743 FGCR at 8. But see Statement of Reasons in MUR 5743 (Commissioners Weintraub and
14 Von Spakovsky dissenting)(disagreeing that the third party financier should have been
15 admonished and concluding instead that the downloading of photos from a candidate's
16 unrestricted website for incidental use in a mailer independently created and financed by a third
17 party does not constitute republication and is not an in-kind contribution).⁴

⁴ The communications at issue in MUR 5743 were different from the *Thank You* advertisement at issue in this matter in that the communications in MUR 5743 were direct mailings paid for by Emily's List that we concluded expressly advocated the election of Betty Sutton, thus satisfying the express advocacy content standard in 11 C.F.R. § 109.21(c)(3). See First General Counsel's Report in MUR 5743, at 4. Importantly, however, the republication of campaign materials is its own content standard that does not turn on the existence of express advocacy. See 11 C.F.R. § 109.21(c). After concluding that the communications in MUR 5743 did not meet the conduct prong and thus were not coordinated within the meaning of Section 109.21, the Commission nevertheless concluded, without any reference to express advocacy, that the republished candidate campaign photos contained in the mailers constituted an in-kind contribution under Section 109.23.

Applying Section 109.21(c)(2), and consistent with the 2003 *Coordination E&J* and the Commission's conclusion in MUR 5743 that republishing a candidate campaign photograph in a third-party mailing constitutes republication, we conclude that EFRG republished campaign materials, albeit of *de minimis* value as discussed *infra* at 15, by including the Bee campaign photo in *Thank You*. Thus, *Thank You* satisfied the coordinated communication content standard.

c. The Conduct Prong

The use of footage of Tim Bee in *Thank You* also raises the question as to whether the conduct prong of the coordinated communications regulations is satisfied. The conduct prong is satisfied if, among other things, a candidate or committee is materially involved in decisions regarding certain aspects of the communication, including the content of the communication and the means and mode of the communication. 11 C.F.R. § 109.21(d)(2). A candidate or committee is "materially involved in decisions" if the candidate or committee "conveys approval or disapproval of the other person's plans." 2003 *Coordination E&J* at 434.

In Advisory Opinion 2003-25 (Weinzapfel), the Commission concluded that the appearance of a federal candidate in a television ad endorsing and paid for by a non-federal candidate satisfied the "material involvement" conduct standard because "[g]iven the importance of and potential campaign implications for each public appearance by a Federal candidate, it is highly implausible that a Federal candidate would appear in a communication without being materially involved in one or more of the listed decisions [in 11 C.F.R. § 109.21(d)(2).]" To illustrate its reasoning, the opinion noted that the endorsing candidate planned to review the script for "appropriateness." See also Advisory Opinions 2004-1 (Bush/Kerr) and 2004-29 (Akin); Conciliation Agreement in MUR 5410 (Oberweis) (" . . . [t]he Commission has found

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1 that a candidate's appearance in a communication would be sufficient to conclude that the
2 candidate was materially involved in decisions regarding that communication . . ." [citing to
3 AO s 2003-25, 2004-1 and 2004-29.]) In all the situations described in the Advisory Opinions
4 and in MUR 5410, the candidate knew that he was, or would be, appearing in an ad.

5 Bee appears in two segments of *Thank You*. In the first segment, Bee is shown at a
6 podium addressing an audience, apparently on the state senate floor. This footage has the
7 appearance of a taped cable or television broadcast. A date of "3/4/08" appears in the upper-left
8 hand corner of the screen and two chyrons appear at the bottom of the screen – a banner reading
9 "SB 1488, schools: teacher performance pay program" and the caption "Senate Appropriations."

10 On that date, the state senate appropriations committee considered and passed an
11 amended version of the bill. The second segment features footage of Bee conversing with a
12 group of parents and educators, two of whom appear earlier in the ad thanking Bee. Both of
13 those individuals are identified in the ad as associated with the school districts that participated
14 in EFRG. The second segment has the appearance of a staged, rather than a spontaneous taping.
15 An individual who appears in the ad appears to confirm that the gathering was arranged,
16 reportedly stating that someone must have arranged the taping "because it was kind of on the
17 agenda." Scarpinato, *Tax Dollars, supra*.

18 The second segment featuring Bee was shot by EFRG the day SB 1488 passed the state
19 senate, and school officials, parents and teachers were reportedly present to lobby for its passage.
20 *Id.* A news article concerning the ad reported that "Bee said he was aware something was being
21 put together but remained uninvolved." Scarpinato, *Tax Dollars*. The EFRG spokesperson who
22 taped the footage reportedly stated in another news article, however, that Bee was filmed without

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1 his knowledge, and she thought a shot of Bee talking to members of EFRG was a good idea.

2 Scarpinato, *Schools Group, supra*.

3 Both Respondents deny that *Thank You* was coordinated with Bee or anyone affiliated
4 with his campaign. Neither Respondent addresses the footage of Tim Bee that appears in the ad
5 nor do they state whether Bee knew that EFRG videotaped footage of him. Specifically, EFRG
6 stated that the ad was a "unilateral decision and action by EFRG." EFRG Response at 2. It
7 further stated that: "[t]o the best of EFRG's knowledge, Senator Bee had no knowledge of the
8 television advertisement until it was made public," denied that it coordinated the production or
9 broadcast of the ad with Bee or anyone acting on his behalf, and denied that Bee or any of his
10 agents "had any involvement in the advertisement." *Id.* at 2 and 5. Similarly, the Committee
11 stated that neither Bee nor the campaign "had any involvement in the creation or dissemination"
12 of the ad. Committee Response at 2.

13 With respect to the first segment featuring Bee, a safe harbor provision in the "material
14 involvement" conduct regulations provides that the standard is not satisfied if the information
15 material to the creation or production of the communication was obtained from a publicly
16 available source. *See* 11 C.F.R. § 109.21(d)(2). Thus, if as it appears, the footage of Bee in the
17 first segment was obtained from a public broadcast, it falls within the "material involvement"
18 safe harbor. Similarly, footage of Bee obtained from a public broadcast would not signify that he
19 conveyed approval of EFRG's plan to run an ad by appearing in it.

20 With respect to Bee's appearance in the second segment, the available facts are
21 ambiguous as to whether Bee knew he was being filmed for an ad, an implicit assumption in the
22 previously-cited Advisory Opinions and MUR that concluded that a candidate's appearance in an
23 ad triggers the "material involvement" conduct standard. On one hand, Bee's apparently staged

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1 appearance in this segment with individuals associated with EFRG, a group active in helping Bee
2 pass legislation that he sponsored, and a group that Bee reportedly knew was putting something
3 together, suggest he may have known that EFRG was preparing a communication featuring him.
4 On the other hand, EFRG's spokesperson reportedly stated that Bee was filmed without his
5 knowledge. The responses do not address the circumstances under which Bee came to appear in
6 the second segment of the ad or whether he agreed to be filmed with the expectation that EFRG
7 would create a communication positively portraying him that might be distributed or
8 disseminated prior to the election. The responses may be read to effectively deny that Bee
9 reviewed scripts or otherwise weighed in on the ad's content or any other of the decisions listed
10 in Section 109.21(c) in that they broadly deny his involvement in the ad's creation. We have no
11 information to the contrary. The extent, if any, of Bee's knowing participation in a public
12 communication featuring him could only be determined by an investigation.

13 We do not believe this matter warrants the commitment of further Commission resources
14 to gather additional information relevant to the conduct standard given that the content prong is
15 satisfied by a single republished campaign photo of Bee. The Bee photo was on screen for only
16 two seconds of the thirty-second ad, and it was incidental to the advertisement, which primarily
17 focused on state legislation that Bee sponsored. Thus, similar to Sutton, the republished photo
18 was of *de minimis* value. Under these circumstances, and informed by the Commission's
19 decision in MUR 5743 (Betty Sutton for Congress), we recommend that the Commission
20 exercise its prosecutorial discretion and dismiss the coordination communications allegation as
21 to EFRG, the Committee, and Tim Bee. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985);
22 Statement of Reasons of Chairman Walther, Vice Chairman Petersen and Commissioners
23 Bauerly, Hunter and McGahn II in MUR 6020 (Pelosi/The Alliance for Climate

Protection)(dismissing as a matter of prosecutorial discretion a matter involving an advertisement featuring Speaker Nancy Pelosi "even if the advertisement met the coordinated communication standards.")

2. EFRG Does Not Appear to Have Made an Excessive or Prohibited In-Kind Contribution as a Result of the Republished Campaign Photo

Since EFRG republished campaign materials in the form of the Bee campaign photo, it made an in-kind contribution to the Committee. Arizona state corporate records confirm that EFRG was not incorporated, so the resulting in-kind contribution does not constitute a prohibited corporate contribution. In addition, unlike the respondent in MUR 5743, EFRG did not make any direct contributions to the Committee. Therefore, it does not appear that EFRG exceeded the \$2,300 contribution limit in effect during the 2008 election cycle as a result of making an in-kind contribution in the form of the republished photo of *de minimis* value. See 2 U.S.C. § 441a(a)(1)(A). Therefore, we recommend that the Commission find no reason to believe that EFRG violated 2 U.S.C. § 441b or 2 U.S.C. § 441a(a)(1)(A).

3. EFRG Does Not Appear to Be a Political Committee

The complaint maintains that EFRG is a political committee because it made expenditures in excess of \$1,000 for *Thank You*, thereby meeting the statutory threshold required for political committee status under 2 U.S.C. § 431(4)(A). It further points to EFRG's spending on the ad as evidence that EFRG "appears to have as its major purpose the nomination or election of a federal candidate." Complaint at 3.

The Act defines a "political committee" as any . . . association, or other group of persons that receives "contributions" or makes "expenditures" for the purpose of influencing a federal election which aggregate in excess of \$1,000 during a calendar year. 2 U.S.C. § 431(4)(A). To

1 address constitutional overbreadth concerns, the U.S. Supreme Court has held that only
2 organizations whose major purpose is campaign activity can potentially qualify as political
3 committees under the Act. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v.*
4 *Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) ("MCFL"). The Commission has
5 interpreted that test as limited to organizations whose major purpose is federal campaign activity.
6 *See* Supplemental Explanation and Justification, *Political Committee Status*, 72 Fed. Reg. 5595,
7 5597, 5601 (Feb. 7, 2007) ("*Political Cmte. Supp. E&J*").

8 EFRG made an in-kind contribution to the Committee in the form of a republished
9 campaign photo of Tim Bee under 11 C.F.R. § 109.23. The complaint provides no information
10 suggesting that EFRG may have made contributions or expenditures beyond its spending for
11 *Thank You*. Even if the *de minimis* value of the republished campaign photo exceeded the
12 \$1,000 statutory threshold for political committee status, the available information does not
13 suggest that EFRG's major purpose was federal campaign activity.

14 An organization's "major purpose" may be established through public statements of its
15 purpose and through sufficient spending on Federal campaign activity. *See Political Cmte. Supp.*
16 *E&J* at 5601-5602. A search of publicly available information uncovered no public statements
17 made by EFRG regarding its purpose. As for its spending, according to a news report, EFRG
18 reportedly received \$194,000 in funds from its participating members and spent \$124,528 on a
19 lobbying firm since its formation about two years ago. *See Scarpinato, Tax Dollars, supra*. The
20 only specific EFRG spending of which we are aware other than *Thank You* are two mailings that
21 EFRG attached to its response. EFRG Response at 3 and Attachment D thereto. These mailings
22 thank another state senator for her efforts on SB 1488, the legislation at the center of *Thank You*,
23 and do not constitute federal campaign activity.

Accordingly, we recommend that the Commission find no reason to believe that EFRG violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee.

4. No Disclaimer was Required to be Placed on Thank You


The Act requires a political committee that makes a disbursement to finance, *inter alia*, a television advertisement, to place a disclaimer on it. 2 U.S.C. § 441d(a). It also requires disclaimers on all public political advertising financed by any person that expressly advocates the election or defeat of a candidate. *Id.* Because EFRG does not appear to be a political committee and *Thank You* does not expressly advocate Bee's election, we recommend that the Commission find no reason to believe that EFRG violated 2 U.S.C. § 441d.

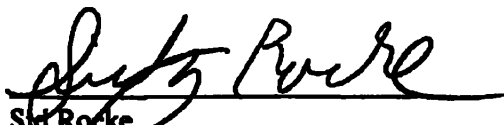
IV. RECOMMENDATIONS

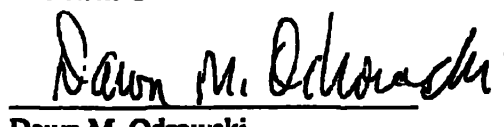
1. Dismiss the allegations in the complaint that Education Finance Reform Group coordinated an advertisement with Tim Bee and Tim Bee for Congress and David Katsel, in his official capacity as treasurer.
2. Find no reason to believe that Education Finance Reform Group violated 2 U.S.C. § 441a(f) or 2 U.S.C. § 441b by making an excessive or prohibited in-kind contribution to Tim Bee for Congress and David Katsel, in his official capacity as treasurer, in the form of republished campaign material.
3. Find no reason to believe that Education Finance Reform Group violated 2 U.S.C. §§ 433 or 434(b) by failing to register and report as a political committee.
4. Find no reason to believe that Education Finance Reform Group violated 2 U.S.C. § 441d by failing to include a disclaimer on its advertisement.
5. Approve the attached Factual and Legal Analyses.
6. Approve the appropriate letters and close the file.

June 16, 2009
Date

Thomasenia P. Duncan
Thomasenia P. Duncan
General Counsel


Ann Marie Terzaken
Associate General Counsel for Enforcement


Sid Locke
Assistant General Counsel


Dawn M. Odrowski
Attorney

Attachments:

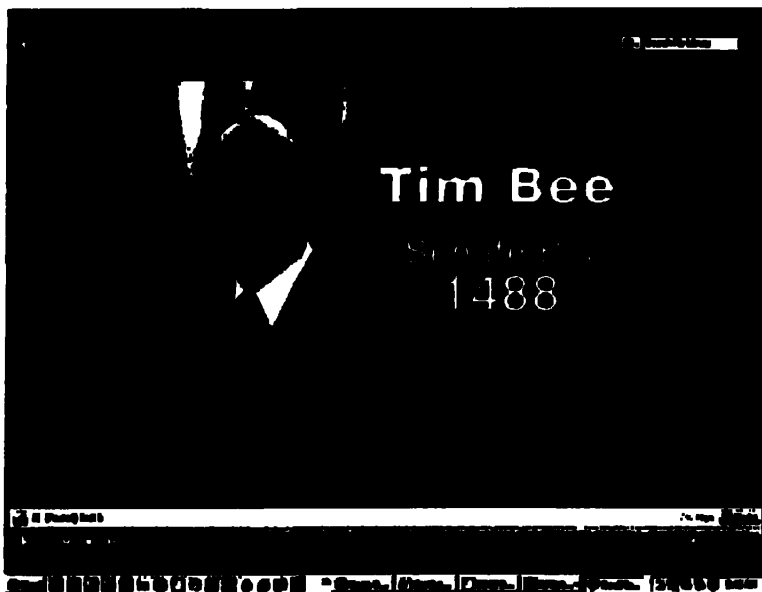
1. Comparison of Bee Photo in EFRG Ad with Photos on the Committee's Website

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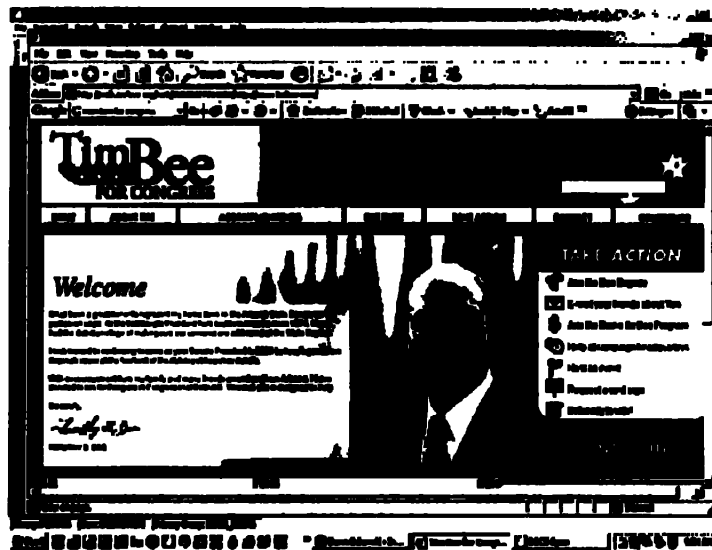
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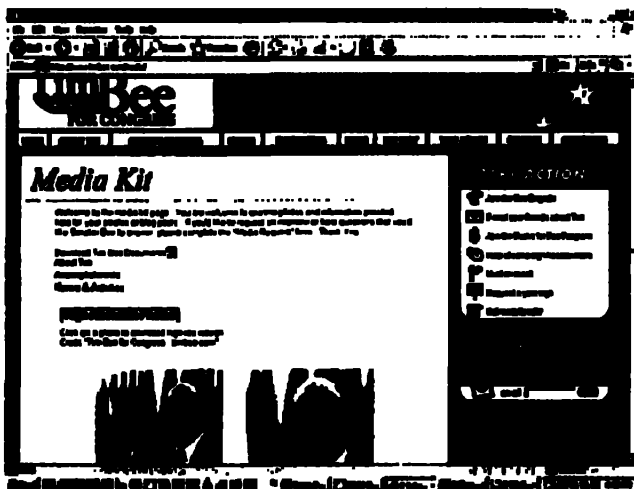
A. Frame of Bee campaign Photo in "Thank You" television ad.



B. "Timbee.com" website
Home page



C. "Timbee.com" website
"Media Kit" page



D. Download
of Bee Photo
from "Media
Kit" website
page